IP 01-1658-C T/K Allen v Davis
Judge John D. Tinder Signed on 05/30/07

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

HOWARD A. ALLEN, JR.	)	
	)	
Petitioner,	)	
vs.	)	1:01-cv-1658-JDT-TAB
	)	
CECIL DAVIS, Superintendent,	)	
	)	
Respondent.	)	

Entry Discussing Motion to Alter or Amend Judgment

I.

Judgment in this action for a writ of habeas corpus was entered on the clerk's docket on September 19, 2006. The petitioner's post-judgment filing, entitled *Petitioner's F.R.C.P. Rule 59 Motion to Alter or Amend Judgment and for Reconsideration of This Court's Denial of Petitioner's Writ of Habeas Corpus*, was filed on October 2, 2006.

All motions that substantively challenge the judgment, filed within 10 business days of the entry of judgment will be treated as based on Rule 59, "no matter what nomenclature the movant employs." *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin,* 957 F.2d 515, 517 (7th Cir. 1992); *see also Curry v. United States,* 307 F.3d 664, 666 (7th Cir. 2002) (a motion seeking substantive relief filed within 10 days after the judgment is, regardless of the label, to be treated as a Rule 59(e) motion)(citing cases).

II.

Rule 59(e) "authorizes relief when a moving party 'clearly establish[es] either a manifest error of law or fact' or 'present[s] newly discovered evidence.'" *Souter v. International Union*, 993 F.2d 595, 599 (7th Cir. 1993) (quoting *Federal Deposit Ins. Corp. v. Meyer,* 781 F.2d 1260, 1268 (7th Cir. 1986)). The purpose of a motion to alter or amend judgment under Rule 59(e) is to have the court reconsider matters "properly encompassed in a decision on the merits." *Osterneck v. Ernst and Whinney,* 489 U.S. 169, 174 (1988). The Court of Appeals has explained that there are only three valid grounds for a Rule 59(e) motion--newly-discovered evidence, an intervening change in the law, and manifest error of law. *See Cosgrove v. Bartolotta,* 150 F.3d 729, 732 (7th Cir. 1998).

III.

A.

Petitioner Allen contends in his motion to alter or amend that this court's analysis did not adequately address petitioner's claim that his execution is unconstitutional because he is mentally retarded and that the deferential standard of review in the AEDPA is not applicable because the state court never adjudged the mental retardation claim under *Atkins v. Virginia*, 536 U.S. 304 (2002). Allen claims that the Indiana Supreme Court improperly allowed the trial court to make factual findings without an evidentiary hearing on the mental retardation issue and that consequently, the determination was fundamentally unfair.

This court does not agree. The court recognized that the trial court considered the evidence regarding mental retardation and in the end, determined that Allen was not mentally retarded. The Indiana Supreme Court explained that the factual analysis, whether Allen is mentally retarded, reaches the same conclusion, and that, "the trial court meant that Allen had not proved to the court's satisfaction that Allen was actually mentally retarded." Allen has not shown that the Indiana state court's procedure resulted in an unjust outcome in light of all the evidence discrediting his mental retardation.

Allen's argument is flawed in law, because the Indiana courts' determination--that the record clearly provided a reasonable basis for the mental retardation outcome--was not premised on an unreasonable determination of facts, nor was it contrary to, or an unreasonable application of, federal law as determined by the United States Supreme Court. Under these circumstances, and under the AEDPA, Allen's *Atkins* claim was not one on which this court could grant a writ of habeas corpus, and the claim itself was in no way overlooked.

B.

Allen also seeks an evidentiary hearing. "Because the deferential standards prescribed by §2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate." *Schriro v. Landrigan*, 127 S.Ct. 1933, 1940 (2007) (citing *Mayes v. Gibson*, 210 F.3d 1284, 1287-1289 (10th Cir. 2000).

Under 28 U.S.C. §2254(e)(2), an evidentiary hearing is required only if a petitioner "alleges facts which, if proved, would entitle him to relief and the state courts--for reasons beyond the control of the petitioner--never considered the claim in a full and fair hearing." *Porter v. Gramley*, 112 F.3d 1308, 1317 (7th Cir. 1997) (citing *Townsend v Sain,* 372 U.S. 293, 312 (1963), and *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992)), *cert. denied,* 522 U.S. 1093 (1998). It follows that, "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary

hearing." *Landrigan*, 127 S.Ct. at 1940. Similarly, if the result would not change even if a habeas applicant is permitted to offer additional facts at an evidentiary hearing, "a District Court has discretion to deny an evidentiary hearing." *Id.* at 1944. This court's authority to hold an evidentiary hearing pursuant to § 2254(e)(2) is "severely circumscribed." *See Boyko v. Parke,* 259 F.3d 781, 789-90 (7th Cir. 2001).

Allen argued in state court that he was mentally retarded under the same definition of mental retardation that is now used in Indiana following *Atkins*. He was given the opportunity to factually develop the mental retardation claim in state court. Because the fact-finding of the Indiana Supreme Court fully comported with the requirements of due process under the circumstances, and because the findings from that proceeding are sufficient to both support and review its resolution of petitioner's *Atkins* claim, an evidentiary hearing is not warranted here. *See Newell v. Hanks*, 283 F.3d 827, 838 (7th Cir. 2002)(an evidentiary hearing is only necessary when a more extensive factual record must be compiled to decide an issue).

IV.

There was in this case no manifest error of law or fact. *See Russell v. Delco Remy Div. of General Motors Corp.,* 51 F.3d 746, 749 (7th Cir. 1995). The court did not misapprehend the petitioner's mental retardation claim, nor did it misapply the law to his claim in light of the expanded record. Accordingly, the motion to alter or amend the judgment is **denied.** Petitioner's request for an evidentiary hearing is **denied**.

IT IS SO ORDERED.

Date: _____

Distribution:

Stephen R. Creason
Office of Attorney General
Indy Government Center South, 5th Flr.
402 W Washington Street
Indianapolis, IN 46204

Laurence E. Komp
423 Madrina
Ballwin, MO 63021

Alan M Freedman
Midwest Center For Justice
831 Main Street

Evanston, IL 60202